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IN THE

Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

—v.—

LEE BOLLINGER, *et al.*,

Respondents.

JENNIFER GRATZ and PATRICK HAMACHER,

Petitioners,

—v.—

LEE BOLLINGER, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR *AMICI CURIAE* SENATORS THOMAS A. DASCHLE, EDWARD M. KENNEDY, HILLARY RODHAM CLINTON, JON S. CORZINE, RICHARD J. DURBIN, JOHN EDWARDS, RUSSELL D. FEINGOLD, JOHN F. KERRY, MARY L. LANDRIEU, FRANK R. LAUTENBERG, CHARLES E. SCHUMER AND DEBBIE STABENOW IN SUPPORT OF RESPONDENTS

Penny Shane
Theresa Trzaskoma
Philip Huynh
125 Broad Street
New York, New York 10004
(212) 558-4000

David T. Goldberg
Counsel of Record
99 Hudson Street
New York, New York 10013
(212) 334-8813

Counsel for Amici Curiae

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STATEMENT OF INTEREST*

Amici are United States Senators elected from different parts of the Nation. We submit this Brief to urge that the Court reaffirm Justice Powell's conclusion in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), that institutions of higher education have a compelling interest in the educational benefits of diversity and that such institutions may, consistent with the Constitution and Title VI, 42 U.S.C. § 2000d, adopt policies that include racial minority status as one of a number of factors considered in determining which academically qualified applicants will be offered admission.

As members of the branch to which the Constitution assigns responsibility for "enforc[ing], by appropriate legislation," the anti-discrimination guarantees of the Thirteenth and Fourteenth Amendments, *see* U.S. CONST. amends. XIII § 2, XIV § 5, and of Senate Committees with principal jurisdiction over our Nation's civil rights and education laws, *Amici* have devoted substantial attention to the vital issues implicated by the *Bakke* decision. We have worked to forge consensus on measures aimed at broadening educational opportunity and promoting inclusion. These efforts, we believe, have made our Nation better and stronger.

We submit this Brief to bring to the Court's attention the longstanding practices and considered judgments of the legislative branch of the federal government concerning the questions these cases present.

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* This brief was not authored in any part by counsel for a party, and no one other than *Amici* or their counsel made a monetary contribution to its preparation or submission. By letters on file with the Court, all parties have consented to its submission.

SUMMARY OF ARGUMENT

More than two decades ago, Justice Powell's *Bakke* opinion recognized the "paramount" importance of policies that promote racial diversity in higher education.

Over the years since then, the Executive and Legislative branch have resoundingly endorsed Justice Powell's view through a wide range of actions. Experience and substantial empirical evidence both have confirmed the correctness of Justice Powell's assessment. Indeed, admissions policies aimed at promoting diversity have strengthened our society, our economy, and our democratic institutions in ways that even he may not have foreseen. Such policies are inseparable from the core functions of higher education – broadening the minds of young adults and preparing them for citizenship – and are indispensable to overcoming the conditions of racial separation, inequality, misunderstanding and mistrust that continue to prevent our Nation from achieving its full promise.

In this Brief, we show that there is no reason for the Court to depart either from the result reached in *Bakke* or the legal principles articulated in Justice Powell's opinion. The *Bakke* decision was, we submit, entirely sound as a matter of constitutional and statutory interpretation, and the standards articulated in Justice Powell's opinion have proved intelligible to educators, legislators and courts alike.

Further, the intervening decades have seen no erosion in *Bakke*'s legal and factual underpinnings. Rather, in every important way, this Court's subsequent constitutional cases have built upon the key premises of Justice Powell's opinion, and recent social science research has documented, in concrete ways, what he understood to be an indisputable fact: that students benefit from "wide exposure to the ideas and mores of students as diverse as this nation of many peoples." 438 U.S. at 313 (Opinion of Powell, J.) (quoting *Keyishian* v. *Board of Regents of the Univ. of the State of New York*, 385 U.S. 589, 603 (1967)).

But there is an even stronger reason for continued adherence to *Bakke*. As we explain, Congress has remained free in the intervening years to revisit the *statutory* issue presented in *Bakke* and to thereby deny Justice Powell's opinion practical effect.

Yet Congress has not taken any step to undermine *Bakke*. On the contrary, both Congress and the Executive have concluded, over the course of long involvement with the issues, that Justice Powell's decision in *Bakke* was not only legally *controlling*, but that it was *correct* as a matter of fundamental policy. This conclusion has been subscribed to by members of both political parties, and has prevailed across administrations with different political philosophies. It has been expressed through numerous legislative acts, including significant amendments to Title VI itself; through rejection of proposals that would have undermined *Bakke*; through passage of other laws that can only be understood as endorsing *Bakke's* interpretation of Title VI; and through longstanding, congressionally endorsed Executive interpretation. Congress has appropriated hundreds of millions of dollars, including the federal funds received by Respondents in these cases, on the understanding that compliance with *Bakke is* compliance with federal law.

The significance of this record of careful, sustained attention and endorsement is at least twofold. First, under the Court's statutory interpretation precedents, it would be extraordinary to construe Title VI as making *unlawful* an admissions policy that is in all meaningful respects indistinguishable from the "Harvard Plan." That argument failed to persuade a Court majority 24 years ago, and since then Congress has treated Justice Powell's opinion as controlling.

Second, and no less important than the specific legislative measures passed in accordance with *Bakke*, is the broader congressional judgment these measures express: that diversity and inclusion in institutions of higher education are indispensable to attaining overarching

national goals. In revisiting Justice Powell's conclusion that the purposes served by admissions policies like those at the University of Michigan are "compelling," this Court may not lightly set aside the determinations of the branch of government elected by the people and endowed by the Constitution with responsibility for identifying what measures are "appropriate" to secure constitutionally guaranteed civil rights to all Americans.

The record of consideration and debate we discuss below vindicates Justice Powell's judgment that these important issues need not, and therefore should not, be the subject of a nationwide, judicially imposed admissions rule.

ARGUMENT

I. *BAKKE* WARRANTS CONTINUED ADHERENCE.

A. Justice Powell's Opinion Was Constitutionally Sound and Practically Viable.

Although it has sometimes been characterized as a "compromise," Justice Powell's *Bakke* opinion made no attempt to "broker" a political consensus between factions of the Court. His opinion instead represents a quintessentially *judicial* task: reconciling conflicting legal and constitutional imperatives in light of both a history of stark and reprehensible failure, *see Bakke*, 438 U.S. at 387-395 (Marshall, J., dissenting), and a "dream" for a future where racial inequality no longer divides Americans, *see City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 505-06 (1989).[1]

The evident virtues of Justice Powell's resolution are substantial. His opinion highlighted the dangers of reflexive, unthinking reliance on race, but it did not force all

[1] It might be said that Justice Powell's opinion was addressing "a condition, not a theory." *See United States* v. *Virginia*, 518 U.S. 515, 563 (1996) (Rehnquist, C.J., concurring); *see also* Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 522 (2002).

institutions of higher education to pursue a single course. It did not impose a nationwide rule that race could *not* be considered, but it also did not *require* institutions to adopt admissions policies based on the Harvard Plan.

Moreover, the standards Justice Powell's opinion established are well understood by educators, legislators and students, as well as by courts. Admissions policies that rely on quotas or treat race as determinative violate the law. By contrast, institutions that pursue the educational benefits of diversity are not disabled from considering race alongside other factors in deciding which academically qualified applicants to admit.

Thus, the opinion is important not only for what it resolved, but also for what it *left open* for others to decide. Educators retain substantial discretion, and at the same time the basic premises underlying the opinion remain open to debate and revision in the political process. *See* Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 93 (1996) ("[I]t would be a democratic disaster if the Court were to issue a broad ruling that foreclosed democratic debate.").

Finally, at least implicit in Justice Powell's opinion was recognition that the legal materials the Court was called upon to apply in *Bakke* (and again here) – the Fourteenth Amendment and Title VI – do not specify clear answers to the question presented. This is because the Framers of the Fourteenth Amendment *did not* intend to foreclose government consideration of race *per se*. *See* Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 430-431 (1997) (collecting explicitly race-conscious statutes enacted by Reconstruction Congress); ANDREW KULL, THE COLOR-BLIND CONSTITUTION 67 (1992) (citing evidence that in drafting the Fourteenth Amendment, the Thirty-ninth Congress *rejected* proposed "color-blindness" language). Although it was forcefully asserted in *Bakke* that a different conception of "discrimination" – one referring to *any* distinction based on race – had animated Congress when it enacted Title VI, that

contention failed to persuade a majority of the Court. *Compare* 438 U.S. at 413-14 (Stevens, J., dissenting in part), *with* 438 U.S. at 284, 284-87 ("The concept of 'discrimination,' like the phrase 'equal protection of the laws,' is susceptible of varying interpretations.").[2]

B. There Is No Legitimate Reason, Let Alone Any "Special Justification," for Rejecting *Bakke*.

1. Subsequent Constitutional Rulings Build Upon Rather than Undermine *Bakke*.

Since *Bakke*, this Court's constitutional decisions have reaffirmed each of the key insights expressed in Justice Powell's opinion. His conclusion that strict scrutiny is the appropriate standard is now the law. *See Croson*, 488 U.S. at 493-94; *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 227 (1995). It is now also established, as was suggested by Justice Powell's endorsement of the Harvard Plan, that such review is not to be "fatal in fact." *Adarand*, 515 U.S. at 237.[3] Rather, strict scrutiny serves as a *means* for determining whether the purpose claimed to be advanced by a classification is the actual one, and if so, whether it is "benign." *See Croson*, 488 U.S. at 493.

Nor has intervening case law undermined the distinction between a rigid quota and a policy that considers race or gender as one of many factors. To the contrary, this Court has confirmed that the line between the two is "'is none the

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[2] The legislative history of Title VI provides substantial support for construing the statutory language, as Justice Powell did, in light of an overarching commitment to inclusion. *See, e.g.*, 110 CONG. REC. 6552 (1964) (statement of Sen. Humphrey) (arguing that the Civil Rights Act responded to the desire of excluded races "to be part of our national life" by advancing "the full participation of the American people in their society and in their community life").

[3] Indeed, we are reminded that: "This Court never has held that race-conscious decision making is impermissible in all circumstances." *Shaw* v. *Reno*, 509 U.S. 630, 642 (1993).

worse for being narrow.'" *Bakke*, 438 U.S. at 318 (quoting *McLeod* v. *Dilworth*, 322 U.S. 327, 329 (1944)). In *Johnson* v. *Santa Clara Transportation Agency*, 480 U.S. 616, 638 (1987), the Court upheld a public employer's use of gender as a "plus" in making a promotion decision, *see id.* at 652, 647-57 (O'Connor, J., concurring in judgment) (concluding that the policy satisfied Equal Protection standards). And in *Easley* v. *Cromartie*, 532 U.S. 234 (2001), the Court reaffirmed that only government action *predominantly* motivated by racial considerations raised constitutional problems. The reason for this distinction was the same one articulated in *Bakke*: "appearances do matter." *See Shaw* v. *Reno*, 509 U.S. 630, 647 (1993); *Bakke*, 438 U.S. at 319 n.53 (explaining that "'[j]ustice must satisfy the appearance of justice'") (quoting *Offutt* v. *United States*, 348 U.S. 11, 14 (1954)).

Any risk that race-based admissions policies will reinforce stereotypical "perception[s] that members of the same racial group . . . think alike," *Shaw*, 509 U.S. at 647, is eliminated when race is part of a broader process, and not singled out from other relevant considerations. Under those circumstances, as Justice Powell explained, a disappointed applicant has "no basis to complain of unequal treatment under the Fourteenth Amendment." *Bakke*, 438 U.S. at 318.

Additionally, while the level of judicial scrutiny is not to vary according to the race of the individual complainant, the Court has made clear that policies aimed at inclusion do not pose the same constitutional hazards as those that entail exclusion or separation. *See Adarand*, 515 U.S. at 229 (decision to require consistent strict scrutiny does not ignore the "difference between 'an engine of oppression' and an effort 'to foster equality in society'") (quoting dissent). When government undertakes to exclude a class of individuals on account of group membership, there is reason for concern that it is expressing contempt or stereotype about that class, *see Romer* v. *Evans*, 517 U.S. 620, 632 (1996); perpetuating and aggravating historic discrimination, *see Virginia*, 518 U.S. at 534; or impeding its citizens from

interacting with one another, *see Shaw*, 509 U.S. at 646-47. Inclusive policies, on the other hand, present no such concerns about the government's intentions. *Cf. Adarand*, 515 U.S. at 275 (Ginsburg, J., dissenting) (noting that judicial scrutiny should be "fatal" for "a *Korematsu*-type classification").[4]

Finally, the Court's recent cases refute the claim that strict scrutiny is incompatible with respect for educators' good faith judgments concerning "who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy* v. *New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J. concurring); *see also, e.g., Regents of the Univ. of Michigan* v. *Ewing*, 474 U.S. 214, 225 (1985) (requiring restrained judicial review of academic decisions). Educational decisions, like those allocating political representation, are sensitive and complex; they implicate values that federal courts strive to respect, such as academic freedom and self–government. *See Miller* v. *Johnson*, 515 U.S. 900, 915 (1995) (citing Justice Powell's *Bakke* opinion).

2. *Bakke's* Factual Understandings Regarding the Benefits of Diversity Are Unassailable.

Nor can *Bakke* be grouped with decisions found to rest on a later-discredited "understanding of facts." *See Planned Parenthood of S.E. Pa.* v. *Casey*, 505 U.S. 833, 862-63 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.) (discussing *Plessy* v. *Ferguson*, 163 U.S. 537 (1896)).

On the contrary, an ever-mounting body of empirical and social science evidence confirms Justice Powell's conclusion that individual students and the Nation as a whole benefit from admissions policies that promote student diversity. *See generally Compelling Interest: Examining the*

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[4] The constitutional distinction between categorical exclusion based on race or gender and individual decisions that are influenced by those considerations was highlighted in the dissenting opinion in *J.E.B.* v. *T.B.*, 511 U.S. 127, 156-63 (1994) (Scalia, J., dissenting).

Evidence on Racial Dynamics in Higher Education (Mitchell Chang, et al. eds.) (overview of research on race and higher education); Jeffrey F. Milem & Kenji Hakuta, *The Benefits of Racial and Ethnic Diversity in Higher Education, in* MINORITIES IN HIGHER EDUCATION 1999-2000: SEVENTEENTH ANNUAL STATUS REPORT 39-44 (Deborah J. Wilds ed., 2000) (overview of research on benefits of racial diversity in higher education); Sylvia Hurtado, et al., *Enacting Diverse Learning Environments: Improving the Climate for Racial/Ethnic Diversity in Higher Education* (1999) (review of research on racial diversity and campus climate).[5]

Student body diversity, these studies establish, can strongly and positively affect learning, both in and out of the classroom. *See* Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools, in*

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[5] Recognition of the enlightening influence of diversity in education and the vital benefits that such diversity provides our democracy did not begin with *Bakke*. In *Sweatt* v. *Painter*, 339 U.S. 629 (1950), this Court firmly rejected the notion that a racially segregated law school could provide an "equal" legal education. The Court answered that a "law school . . . cannot be effective in isolation from the individuals and institutions with which the law interacts." *Id.* at 634. Likewise, in *United States* v. *Ballard*, 329 U.S. 187, 193 (1946), the Court rejected assertions that an "all male [jury] panel drawn from the various groups within a community will be as truly representative as if women were included [because. . . .] the factors which tend to influence the action of women are the same as those which influence the action of men – personality, background, economic status – and not sex." As the *Ballard* Court explained: "It is not enough to say that women when sitting as jurors neither act nor tend to act as a class," because "a community made up exclusively of one [sex] is different from a community composed of both." *Id.*

A century earlier, with civil war impending, Harvard's President, Cornelius C. Felton, "recognized an urgent need for universities to reach out more consciously to students from different parts of the country because gathering such students 'must tend powerfully to remove prejudices by bringing them into friendly relations.'" Neil L. Rudenstine, *Student Diversity and Higher Learning, in* DIVERSITY CHALLENGED: EVIDENCE OF THE IMPACT OF AFFIRMATIVE ACTION 32 (Gary Orfield, ed., Nov. 2001).

DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 143 (Gary Orfield, ed., Nov. 2001). Bringing together students with differing life experiences and perspectives broadens and deepens discussions; it engages students' critical thinking faculties and requires them to take seriously opposing, sometimes unfamiliar points of view. *Id.* at 160, 166-67; *see also* Geoffrey Maruyama & José F. Moreno, *University Faculty Views About the Value of Diversity on Campus and in the Classroom, in* DOES DIVERSITY MAKE A DIFFERENCE? THREE RESEARCH STUDIES ON DIVERSITY IN COLLEGE CLASSROOMS 9, 14-16 (2000) (hereinafter "DOES DIVERSITY MAKE A DIFFERENCE?").

A learning environment in which students encounter and discuss ideas with peers whose backgrounds and perspectives are different from their own "fosters conscious, effortful, deep thinking" rather than automatic, preconditioned responses. *Expert Report of Patricia Gurin,* in *Gratz* v. *Bollinger,* No. 97-75321 (E.D. Mich.) and *Grutter* v. *Bollinger,* No. 97-75928 (E.D. Mich.) (hereinafter *"Gurin Report"*) at § V(B)(1)(6); *see also* Patricia Mann, *The Educational Possibility of Multi-Racial/Multi-Ethnic College Classrooms, in* DOES DIVERSITY MAKE A DIFFERENCE? 61, 69-70 (2000).

Research further establishes that the broad benefits to students are lifelong. Students of all races tend to continue the patterns of interracial interaction they learned in college. "In particular, whites who grew up in predominantly white neighborhoods, but attended colleges with relatively high proportions of minority students, are much more likely to have friends, neighbors, and co-workers of diverse racial backgrounds than their white neighbors who attended colleges with low racial diversity." Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny,* 77 N.Y.U. L. REV. 1195, 1223, 1222-25 (2002) (citing J.H. Braddock, et al., *Why Desegregate? The Effect of School Desegregation on Adult Occupational Desegregation of African Americans, Whites, and Hispanics,* 31 INT'L J. CONTEMP. SOC. 273, 281 (1994)).

Individuals educated in a diverse environment have been found to be more heterodox and less stereotype-driven in both their racial attitudes and their thinking about a broad array of public policy issues than peers educated in more homogeneous settings.

That higher education plays such a pivotal role is no happenstance. As Professor Gurin explains, individuals "in late adolescence and early adulthood are at a critical stage of development," where they "experiment with different social roles before making permanent commitments to an occupation, to intimate relationships, to social groups and communities, and to a philosophy of life." *Gurin Report,* at § V(B) (citing, *inter alia,* Erik Erikson, *Ego Development and Historical Change, in* 2 PSYCHOANALYTIC STUDY OF THE CHILD 359-96 (1946)). The result at institutions that "take advantage of this developmental stage," *see id.,* and enroll diverse student bodies is greater "acceptance of people with different races/cultures, cultural awareness, tolerance of people with different beliefs, and leadership abilities." Sylvia Hurtado, *Linking Diversity and Educational Purpose, in* DIVERSITY CHALLENGED 198.

Not only has it been shown that "students who experienced diversity in classroom settings and in informal interactions showed the most [civic and cultural] engagement *during college," Gurin Report,* at § IV (emphasis supplied), but the evidence attests to the strong, persistent links between educational diversity and democracy. *See Brown* v. *Board of Educ.,* 347 U.S. 483, 493 (1954).

Students educated in heterogeneous environments are better prepared for citizenship. Experiences of heightened exposure to and engagement with peoples of different races and cultures foster an increased sense of commonality across racial and cultural lines and an elevated ability to understand the perspectives of others. *See Gurin Report* at § V; *see* Anderson, 77 N.Y.U. L. REV. at 1204 ("Democracy is a form of governance in which a collective will is forged on the basis of open discussion among equals. It requires a

robust civil society in which citizens from all walks of life interact freely on terms of equality.").

As Bowen's and Bok's comprehensive study documents, admissions policies like those in place at the University of Michigan have transformed the ranks of the Nation's professional, government and business leaders. WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: THE LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 158-64 (1998). Importantly, minority graduates of selective schools have very high rates of political participation and civic and community involvement. *Id.*

The significance of increased civic engagement from minority citizens should not be underestimated, especially in light of the country's ongoing struggle with segregation and discrimination. The presence of individuals in positions of government and corporate leadership who have significant ties to otherwise isolated minority communities has helped assure that our government responds to *all* its citizens, regardless of race.

Finally, the "soundness" of *Bakke* is all the more "apparent from consideration of the alternative." *Casey*, 505 U.S. at 859. Quite apart from the tens of thousands of individuals whose life experiences were radically changed by *Bakke's* approval of limited, race-sensitive admissions policies[6] – and the innumerable others (classmates, children,

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[6] T.L.C., *Thomas Carlyle and Affirmative Action*, 24 J. BLACKS HIGHER EDUC. 7 (Summer 1999) (documenting the numbers of black graduates from the Nation's highest-ranked universities, law schools, business schools and medical schools, who were admitted under affirmative action programs); *see also* Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions*, 72 N.Y.U. L. REV. 1, 21-22 (1997). Bowen and Bok document a similar trend, pointing out that from 1960 to 1996, affirmative action programs led to the doubling of percentages of African-American male executives, managers and administrators, and to (continued . . .)

neighbors and institutions) who can be shown to have benefited – it is apparent that in the absence of such policies, the Nation will lose a critical tool in the struggle to overcome both racial separation and the mistrust it engenders.

Even with the success of affirmative action in integrating communities, our Nation remains highly segregated. *See Expert Report of Thomas J. Sugrue*, in *Gratz* v. *Bollinger*, No. 97-75321 (E.D. Mich.) and *Grutter* v. *Bollinger*, No. 97-75928 (E.D. Mich.) (hereinafter "*Sugrue Report*") at § 4 (reporting that "rates of residential segregation in Detroit were higher in 1990 than they were in 1960"); *see also* DOUGLAS MASSEY & NANCY DENTON, AMERICAN APARTHEID (1993); Erica Frankenberg, et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* (Jan. 2003) (describing trend toward resegregation in primary and secondary education). As Sugrue documents: "The high degree of segregation by race reinforces and hardens perceptions of racial difference. It has profound effects on racial attitudes and opportunities and it creates a domino effect seriously limiting interracial contact in many other arenas of American life." *See Sugrue Report* at § 8.[7]

Abandoning efforts to address the ongoing effects of these pervasive patterns of segregation would be deleterious

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(. . . continued)
the tripling of African-American attorneys and engineers. *See* BOWEN & BOK, THE SHAPE OF THE RIVER at 10-13.

[7] *See* Donald R. Kinder & Tali Mendelberg, *Cracks in American Apartheid: The Political Impact of Prejudice Among Desegregated Whites*, 57 J. POL. 402, 418-22 & 418 tbl.6 (1995) (offering empirical evidence that level of whites' prejudice towards blacks increases with their isolation from them); *see also* Cathy J. Cohen & Michael C. Dawson, *Neighborhood Poverty and African American Politics*, 87 AM. POL. SCI. REV. 286, 293-95 (1993) (providing empirical evidence that blacks living in socially isolated high-poverty neighborhoods are more likely than other blacks to think that whites and middle class people have too much political influence).

for our Country. To ensure that all citizens participate fully in our democracy and work together to pursue common goals, it is imperative that we continue to take advantage of one of the most effective means of diminishing racial polarization.

II. BECAUSE OF THE COMPELLING NATIONAL INTERESTS SERVED, CONGRESS AND THE EXECUTIVE CONSISTENTLY HAVE ENDORSED THE *BAKKE* REGIME.

A. Congress and the Executive Have Treated Justice Powell's *Bakke* Opinion as the Controlling and Correct Interpretation of Title VI.

The question that divided the Court in *Bakke* was a statutory one. Four Justices maintained that Title VI foreclosed any consideration of race and that there was no reason to reach the constitutional Equal Protection issue. Five Justices concluded that an admissions policy, like the Harvard Plan, would be lawful under Title VI.

The political branches were free to disagree with the majority of the Justices' Title VI interpretation in *Bakke* and to "correct it" by amending the statute to expressly forbid race-based admissions policies. *See Neal* v. *United States*, 516 U.S. 284, 295 (1996). Indeed, in cases of disapproval of a decision interpreting federal civil rights statutes, Congress has never been reticent about amending the law. *See, e.g.*, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (1982) (amending 42 U.S.C. § 1973b, in response to *Mobile* v. *Bolden*, 446 U.S. 55 (1980)); Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified at 42 U.S.C. § 2000d-4a *et seq.*) (amending Title VI and related statutes in response to *Grove City College* v. *Bell*, 465 U.S. 555 (1984)); *Landgraf* v. *U.S.I. Film Prods.*, 511 U.S. 244, 250-51 (1994) (noting that the Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (1991), had responded to nine named Supreme Court decisions construing federal employment discrimination statutes).

The record reflects that for more than two decades, Congress and the Executive Branch have treated Justice Powell's opinion as the authoritative construction of Title VI. In 1979, immediately after the *Bakke* decision, the Department of Education undertook a review of existing Title VI regulations and ultimately announced that these regulations would be interpreted consistent with Justice Powell's opinion. This understanding was reiterated in 1991 when the Department explained that under its regulations, "[a] college should have substantial discretion to weigh many factors – including race – in its efforts to attract and retain a student population of many different experiences, opinions, backgrounds, and cultures." Notice of Proposed Policy Guidance, 56 Fed. Reg. 64,548, 64,549 (Dec. 10, 1991). The Department further advised institutions of higher education that they could continue to "consider race as one factor among several when awarding scholarships designed to help create the kind of campus educational environment that results from having a student population with a variety of experiences, opinions, backgrounds, and cultures." *Id.*; *see also* 59 Fed. Reg. 8,756, 8761-62 (Feb. 23, 1994) (noting that "[t]he Court in *Bakke* indicated that race or national origin could be used in making admissions decisions to further the compelling interest of a diverse student body even though the effect might be to deny admission to some students who did not receive a competitive 'plus' based on race or ethnicity" and that no intervening decision had "invalidated Justice Powell's opinion in *Bakke* that the promotion of diversity in the higher education setting is a compelling interest").[8]

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[8] There can be no doubt that this was the understanding of Title VI that governed when the University of Michigan accepted federal funds, and even the Briefs filed by the United States in these cases nowhere indicate that this longstanding construction of Title VI and agency regulations has been reconsidered or abandoned. *Compare* Brief of The United States as *Amicus Curiae* in *University of Georgia* v. *Johnson*, Nos. 00-14382-C, 00-

(continued . . .)

Congress's understanding that both the Judiciary and the Executive had endorsed *Bakke* is beyond dispute. Congress twice enacted significant amendments to Title VI – both signed into law by President Reagan – without seeking to overturn the "diversity" holding. In the Rehabilitation Act Amendments of 1986, for example, Congress abrogated the States' Eleventh Amendment immunity under Title VI (as well as section 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975). *See* Pub. L. 99-506, Title X, § 1003, 100 Stat. 1807, 1845 (1986) (codified at 42 U.S.C. § 2000d-7). Congress also engaged in a comprehensive review of federal civil rights legislation before enacting the Civil Rights Restoration Act of 1987. *See* Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified at 20 U.S.C. § 1681 *et seq.*). When Congress amends a statute, it can be presumed to be familiar with this Court's relevant decisions on the topic and to consider those decisions in amending the statute. *See McCarthy* v. *Bronson*, 500 U.S. 136, 140 (1991); *Conroy* v. *Aniskoff*, 507 U.S. 511, 516 (1993).

Indeed, when the Executive indicated an intention to depart from the course charted by Justice Powell's *Bakke* opinion, the congressional response was emphatically negative. *See* H.R. Rep. No. 102-1086, at 211 (1992) (noting that the Department of Education "always recognized that diversity is a legally acceptable form of affirmative action"); H.R. Rep. No. 102-411, at 8 (1991) ("The Supreme Court [in *Bakke*] has . . . upheld Title VI's provisions that allow race to be considered in promoting student body diversity").

(. . . continued)
14382-CC (11th Cir. 2001) (arguing that "The Department of Education has also relied on Justice Powell's opinion in concluding that race-conscious decision-making for purposes of achieving diversity in higher education does not violate Title VI"), *and* Brief of The United States as *Amicus Curiae* in *Smith* v. *University of Wash. Law Sch.*, Nos. 99-35209, 99-35347, 99-35348 (9th Cir. 1999) (same), *with* Briefs of the United States as *Amicus Curiae* in these cases.

On several occasions, bills were introduced that sought to repeal the *Bakke* decision, and, in every case, these were defeated. For example, the proposed "Riggs Amendment" in 1998 sought to amend the Higher Education Act of 1965 so as "[t]o prohibit discrimination and preferential treatment on the basis of race, sex, color, national origin, or ethnicity in connection with admissions to institutions of higher education." H.R. 3330, 105th Cong. (1998). After Representatives J.C. Watts (R-OK) and John Lewis (D-GA) jointly authored a letter, dated May 5, 1998, to colleagues urging its rejection, that measure failed by a vote of 249 to 171.

Notably, even the *proponents* of these measures acknowledged *Bakke's* force. *See* 142 CONG. REC. H5282 (1996) (Rep. Canady) (noting that "the closely divided court in *Bakke* recognized that race could at least be a factor in determining eligibility for admission to an educational institution receiving Federal financial assistance").

B. Congress Has Enacted and the Executive Has Supported Legislation Recognizing the Educational Benefits of Racial Diversity.

Recognition of the importance of learning with students from diverse backgrounds and of the harms that occur when such opportunities are denied has been a keystone of broader federal education policy for more than a generation. In his 1970 message proposing the Emergency School Aid Act ("ESAA"), Pub. L. No. 92-318, Title VII, §§ 701-720, 86 Stat. 235, 354-371 (1972) (repealed 1978), President Nixon observed:

> This Act deals specifically with problems which arise from racial separation, whether deliberate or not, and whether past or present. It is clear that racial isolation ordinarily has an adverse effect on education. Conversely, we also know that desegregation is vital to quality education – not only from the standpoint of raising the achievement levels of the disadvantaged, but also from the

> standpoint of helping all children achieve the broad-based human understanding that increasingly is essential in today's world.

H.R. Rep. No. 92-576, at 3 (1971). In enacting the law in 1972, Congress concurred with the President, declaring that "racially integrated education improves the quality of education for all children." *Id.* at 10. Congress recognized both that "[e]ducation in an integrated environment, in which children are exposed to diverse backgrounds, is beneficial to both" minority and nonminority children, S. Rep. No. 92-61, at 7 (1971), and that "[w]hether or not it is deliberate, racial, ethnic, and socio-economic separation in our schools and school systems [has] serious and often irreparable adverse effects on the education of all children, be they from deprived or from advantaged backgrounds." *Id.* at 6.

After ESAA was eliminated, Congress enacted the Magnet Schools Assistance Program ("MSAP"), which continued provision of federal financial assistance to local educational agencies for the purpose of eliminating racial isolation. *See* Pub. L. No. 98-377, Title VII, 98 Stat. 1267, 1299-1302 (1984) (repealed 1988). Congress reauthorized MSAP in 1994 based on specific findings that "it is in the best interest of the Federal Government to . . . support . . . school districts seeking to foster meaningful interaction among students of different racial and ethnic backgrounds, beginning at the earliest stage of such students' education." Pub. L. 103-382, Title V, § 5101, 108 Stat. 3518, 3691 (1994) (amended 2002); *see also* S. Rep. No. 106-261, 2000 WL 1700122, at *21 (2000) (providing assistance for magnet school initiatives to improve diversity).

As recently as January 8, 2002, the President signed into law legislation on the finding that "[i]t is in the best interests of the United States . . . to continue the Federal Government's support of . . . local educational agencies that are voluntarily seeking to foster meaningful interaction among students of different racial and ethnic

backgrounds. . . ." Pub. L. No. 107-110, § 5301(a)(4)(A), 115 Stat. 1425, 1806 (codified at 20 U.S.C. § 7231). The new law provides that in furtherance of that interest schools may adopt plans for "the desegregation of minority group-segregated children" and may grant or deny admissions "to carry out the approved plan." 20 U.S.C. §§ 7231c, 7231d.[9]

Although these measures address conditions at the primary and secondary level, those schools are also subject to the strictures of Title VI. It is implausible that Congress would encourage and affirmatively fund such efforts, but consider higher education policies animated by the identical premises as unlawful "discrimination" under Title VI. There is also no logical reason why the benefits of diversity at those levels would be any less at the higher education level.

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[9] Notably, this statute requires recipients of federal funds to *classify* students by race and ethnic background for the wholly benign purpose of assuring that school districts' reported gains on assessment tests are not limited to a particular ethnic subpopulation.

The No Child Left Behind Act of 2001, Pub. L. 107-110, 115 Stat. 1425 (2002) (codified at 20 U.S.C. § 6301 *et seq.*), was enacted to "ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education" and, among other things, to "clos[e] the achievement gap . . . between minority and non-minority children." *Id.* at § 6301. It requires public schools to create performance based standards and implement testing to measure students' progress towards those goals at various grade levels. *Id.* at § 6311. Under the racial accountability standards of the Act, schools must break down test results by race and ethnicity. *Id.* at § 6311(b)(3)(C)(xiii). To avoid sanctions such as staff reorganization, reduced federal funding, or privatization, schools must demonstrate that each major racial and ethnic group is adequately progressing towards performance standards. *Id.* at § 6311(b)(2)(B), (C)(v)(II)(bb). Those schools in which any subgroup falls below the minimum testing level will be designated for improvement and subject to sanctions. *Id.* at § 6311(b)(2)(A)(iii), (B), (C)(v)(II)(bb).

C. The Federal Government Consistently Has Sought to Promote Diversity and Inclusion in Higher Education.

Any claim that the purposes pursued by the university policies at issue in these cases are illegitimate or impermissible as a matter of *federal law* is further controverted by numerous other measures – some dating back to *Bakke*, some enacted within the past year – that aim to promote diversity in higher education and beyond. *See Food & Drug Admin.* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2002) ("At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings. The classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute") (quoting *United States* v. *Fausto*, 484 U.S. 439, 453 (1988)).

In 1979, the year after *Bakke* was decided, Congress vested the National Science Foundation with responsibility for "efforts which provide support for . . . ethnic minorities." S. Rep. No. 96-49, at 52 (1979). More recently, in 1990, President Bush signed into law the Excellence in Mathematics, Science, and Engineering Education Act, Pub. L. 101-589, 104 Stat. 2881 (1990) (repealed 1994), whereby the federal government undertook to "increase the number and diversity of individuals entering and completing graduate and doctoral programs." S. Rep No. 101-412, at 4138 (1990). That Act also called upon the National Science Foundation, in awarding fellowships, to give "priority consideration to increasing the participation of women and minority students." *Id.*

In the past year, Congress has enacted statutes, signed by the President, directing that scholarship funds be awarded upon consideration of factors including individual applicants' race. *See, e.g.*, Pub. L. 107-368, § 10, 116 Stat. 3034, 3049 (2002) (codified at 41 U.S.C. § 1862n-1) (providing

that the Robert Noyce Scholarships for math, science and engineering be awarded, with consideration given to "promoting the participation" of disadvantaged individuals, including minorities); Pub. L. 107-110, Title I, § 1504, 115 Stat. 1425, 1598 (2002) (codified at 20 U.S.C. § 6494) (creating the Close Up Fellowship program for middle and secondary school students and directing that "*special consideration* shall be given to the participation of those students with special educational needs, including students with disabilities, ethnic minority students, and students with migrant parents") (emphasis added).

These measures are consistent with the determination that "declining participation rates for low-income students and minorities at institutions of higher education is of growing concern to the higher education community and Congress." Higher Education Amendments of 1992, Pub. L. 102-325, § 121, 106 Stat. 448, 461 (1992) (amended 1998). They are also in line with the finding that to "increase the number of underrepresented minority and disadvantaged students who enter and successfully complete higher education" is a "pressing national priorit[y]," as is "the lack of diversity at the graduate level." H.R. Rep. No. 106-370, at 344 (1999). They are additionally in keeping with the conclusion that "[p]ositive action is needed . . . to enhance the possibility for increased minority retention and graduation from America's colleges and universities." H.R. Rep. 102-447, 114 (1992). *Cf.* Pub. L. 105-244, Title V, §501(b)(1), 112 Stat. 1581, 1766 (1998) (codified at 20 U.S.C. § 1101(b)(1)) (describing government's purpose as "expand[ing] educational opportunities for, and improv[ing] the academic attainment of, Hispanic students").

Congress also has recognized that promoting opportunity at the undergraduate and graduate level is integral to achieving benefits of workforce diversity in critically important fields. *See, e.g.*, Pub. L. 105-244, Title VII, § 721(a), 112 Stat. 1581, 1794 (1998) (codified at 20 U.S.C. § 1136) (establishing the Thurgood Marshall Legal

Opportunity Program to assist "low-income, minority, or disadvantaged college students" with access to and completion of law studies); Pub. L. 102-325, Title VI, § 621, 106 Stat. 448, 734 (1992) (codified at 20 U.S.C. § 1131) (establishing the Minority Foreign Service Professional Development Program to "significantly increase the numbers of African American and other underrepresented minorities in the international service"); H.R. Rep. No. 106-645, at 164 (2000) (funding "minority science improvement" to "increase the number of minority students who pursue advanced degrees and careers" in those fields); H.R. Rep. No. 107-229, at 30 (2001) (advancing "nursing workforce diversity" through funding to "increase nursing education opportunities for individuals who are from disadvantaged backgrounds, including racial and ethnic minorities"); *see also* CHARLES C. MOSKOS & JOHN SIBLEY BUTLER, ALL THAT WE CAN BE: BLACK LEADERSHIP & RACIAL INTEGRATION THE ARMY WAY (1996) (addressing efforts to promote integration and minority group advancement in military).

This record of enactments represents Congress's agreement with Justice Powell's *reasoning* in *Bakke* that "diversity in higher education" is "of paramount importance." *Id.* at 313. It reflects agreement that "the Nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this nation of many peoples." *Id.* (quoting *Keyishian* v. *Board of Regents of the Univ. of the State of New York*, 385 U.S. 589, 603 (1967).)

III. THE COURT'S RESOLUTION OF THIS CASE MUST TAKE PROPER ACCOUNT OF THE LEGALLY RELEVANT ACTIONS AND JUDGMENTS OF THE OTHER TWO BRANCHES.

A. The Longstanding Judgments of the Legislature and the Executive Are Significant to the *Statutory* Question.

Congress's longstanding endorsement of *Bakke*'s Title VI construction, *i.e.*, that institutions of higher education can

consider race as a factor in admissions, is legally relevant to the statutory interpretation issues presented by these cases. Under this Court's precedents, it would be extraordinary to hold that Title VI could be construed as supporting a result different from that reached in *Bakke*. The fundamental rationale for *stare decisis* in statutory cases is that "unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter" the statute in a way that diverges from the Court's construction. *Patterson* v. *McClean Credit Union*, 491 U.S. 164, 172-73 (1989); *see also Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 736 (1977).

This is not a case of simple inaction. *Bakke* was, to say the least, an unusually well known judicial decision, and Justice Powell's opinion has been given controlling effect in agency regulations – of which Congress has also been keenly aware – for two decades. *See Bob Jones Univ.* v. *United States*, 461 U.S. 574, 600-01 (1983) ("It is hardly conceivable that Congress – and in this setting, any Member of Congress – was not abundantly aware of what was going on"); *Brown & Williamson*, 529 U.S. at 157 (2002) (consistent agency position "provides important context" for understanding congressional enactments).

As described above, Congress has considered and rejected measures proposed to overturn *Bakke* by statute, the *proponents of which* accepted that Justice Powell's opinion was authoritative. Congress has vigorously policed the Executive's adherence to *Bakke*, objecting loudly even to perceived departure from the standards articulated in Justice Powell's opinion, and it has twice amended Title VI, in full awareness of the *Bakke* decision. Finally, Congress has enacted decades worth of legislation in the civil rights and higher education areas on the understanding that Justice Powell's opinion was an accurate statement of the meaning of Title VI, and has appropriated millions of dollars in funds to institutions of higher education, with the understanding that admissions policies that consider race as one factor in order to achieve a diverse student body are entirely lawful.

B. The Longstanding Judgments of the Legislature and the Executive Are *Constitutionally* Significant.

The judgments and actions of the Legislative and Executive branches are relevant to the Court's resolution of the *constitutional* issue, *i.e.*, the meaning of the Equal Protection Clause, as well.

Importantly, the question whether an interest is "compelling" as opposed to merely "important" is not one that should be resolved in isolation from the considered judgments and enactments of other branches of government on the same subject. The term "compelling interest" does not itself appear in the Constitution. *See Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring in part and concurring in judgment) ("[A]s regards certain state interests commonly relied upon in formulating affirmative action programs, the distinction between a 'compelling' and an 'important' governmental purpose may be a negligible one."). *Cf. City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 451-52 (1985 (Stevens, J., concurring) (questioning "levels of scrutiny"); *id.* at 460 (Marshall, J., concurring in the judgment in part and dissenting in part); *United States* v. *Virginia*, 516 U.S. at 569 (Scalia, J., dissenting) (noting limitations of "abstract" Equal Protection standards).[10]

As has already been established, there can be no credible claim that either the constitutional text or the intentions of the Framers of the Fourteenth Amendment *specified* a different conclusion than that reached by Justice Powell in *Bakke*. *See Bakke*, 438 U.S. at 284 (observing that "the phrase 'Equal Protection of the Laws' is susceptible of varying

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[10] *See also* Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 920 (1988); Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381, 414-22 (1998).

interpretations"); *accord Virginia*, 518 U.S. at 568 (Scalia, J., dissenting) (describing "Equal Protection of the Laws" as "ambiguous constitutional text"). *Cf. Wittmer* v. *Peters*, 87 F.3d 916 (7th Cir. 1996), *cert. denied*, 519 U.S. 1111 (1997) (considering the permissibility of race-based decisionmaking under the Equal Protection Clause). Both this Court's precedents and the work of historians make clear that the Equal Protection Clause was *not* intended to foreclose government actors from taking any consideration of race. *See, e.g.*, KULL, THE COLOR-BLIND CONSTITUTION at 67-69 (demonstrating that the Framers of the Fourteenth Amendment considered, but rejected, a proposal to forbid all racial classifications).

In construing other provisions of the Constitution, this Court has looked to prevailing practice in determining whether a government interest is "compelling." *See, e.g.*, *Republican Party of Minn.* v. *White*, 536 U.S. 765, 122 S. Ct. 2528, 2540-41 (2002) (First Amendment); *Burson* v. *Freeman*, 504 U.S. 191, 205-06 (1992) (Scalia, J., concurring in judgment) (First Amendment); *see also Washington* v. *Glucksberg*, 521 U.S. 702, 710 (1997) (Due Process Clause). Indeed, this Court has looked to prevailing legislative understanding in determining the meaning not only of doctrinal terms, but of constitutional *text*, such as "Due Process of Law," and "Cruel and Unusual Punishment." *See, e.g., Burnham* v. *Superior Court*, 495 U.S. 604, 619 (1990) (plurality opinion); *Coker* v. *Georgia*, 433 U.S. 684, 592-96 (1980). Although these cases have provoked sharp disagreement about how best to ascertain constitutionally relevant societal judgment, *see, e.g., Atkins* v. *Virginia*, 536 U.S. 304 (2002), it has been common ground that "statutes passed by society's elected representatives," *Stanford* v. *Kentucky*, 492 U.S. 361, 370 (1989), are the "clearest and most reliable objective evidence." *Penry* v. *Lynaugh*, 492 U.S. 302, 331 (1989).

These principles apply with special force here. First, as discussed above, Congress and the Executive have spoken to

the *very question* that the Court is asked to decide. Because *Bakke* held that the standards under Title VI and the Constitution are the same, *see Alexander* v. *Sandoval*, 532 U.S. 275, 281-82 (2002), the federal government's *substantive* agreement with the *Bakke* decision as evidenced in its actions in connection with Title VI must be understood as resolving this specific question: that the interest in diversity *is sufficiently compelling to support an admissions policy that considers race as one factor among many*.

Second, the question whether an interest is "compelling" and other aspects of the Equal Protection analysis are, in important respects, empirical matters. *See Board of Educ. Westside Cmty. Sch.* v. *Mergens*, 496 U.S. 226, 251 (1990) (plurality opinion of O'Connor, J.) (The Court does "not lightly second-guess . . . legislative judgments, particularly where the judgments are based in part on empirical observations"); *United States* v. *Gainey*, 380 U.S. 63, 67 (1965) ("[S]ignificant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it."); *Wittmer*, 87 F.3d at 916. As was true in *Bakke*, this Court will be presented with many *amicus* briefs seeking to demonstrate the scope and magnitude of benefits of diversity, as well as concerning the efficacy of "percentage plans" or other race-neutral alternatives.

Although a court can evaluate such matters - even when they are not the subject of testimony in trial court - assertions about the effectiveness or consequences of certain policies are hardly self-evident, and they are the sort for which considered judgments of educators and legislators should be given considerable weight.

This is particularly true here given the claims by Petitioners' *amici* regarding the availability and efficacy of "race-neutral" alternatives. *See* Briefs for The United States as *Amicus Curiae* Supporting Petitioners ("U.S. Br.") at 19-21. Whatever promise "percentage plans" may have, questions about their efficacy have already been raised, including that: (1) they fail to achieve sufficiently diverse student bodies, *see*

Carl Irving, *Texas's 'Top Ten-Percenters': In the Absence of Affirmative Action, the State Struggles to Increase Minority Enrollment*, 10 National Cross-Talk (Summer2002) (available at www.highereducation.org/crosstalk.pdf/ct_0302/front.html); (2) even if they do achieve some measure of racial diversity, they only work in already-segregated states and their success depends on continued segregation of our Nation's high schools; (3) they do not allow for thoughtful consideration of which students are actually the most well-prepared for college or graduate school given their exclusive reliance on grades; (4) they create perverse incentives, *see* Julie Berry Cullen, et al., *Jockeying for Position: High School Student Mobility and Texas' Top-Ten Percent Rule* (unpublished manuscript Nov. 2002) (reporting preliminary findings); and (5) they are not an option for graduate and professional schools. There are also legal arguments that such policies - which drastically alter admissions policies - are not a more "narrowly tailored" way of achieving the *same* goals that the universities seek to pursue, but rather simply require administrators to substitute one admissions model for an entirely different one. [11]

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[11] Ironically, given the vigor which they are being urged in this case, it is unlikely that such policies will give universities even a temporary reprieve from litigation: it has already been claimed that percentage plans "amount to a thinly veiled system of selecting students by race." Michael A. Fletcher, *Race-Neutral Plans Have Limits in Aiding Diversity, Experts Say*, WASH. POST, Jan. 17, 2003, at A12. Apparently this is because such plans have relied heavily on stepped-up recruiting efforts, including awarding significant scholarship awards to students from predominantly minority high schools. *See* U.S. Commission on Civil Rights, Office for Civil Rights Evaluation, *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education*, at 28-29, 38-39, 65 n.140 (Nov. 2002). In fact, legal challenges to these measures are currently being prepared. *See* Ron Nissimov, *UT Tailors Scholarship to Minority High Schools*, HOUSTON CHRON., Feb. 12, 2002, at 21 (reporting that the Center for Individual Rights had "plans to legally challenge the new types of programs that offer advantages to students from selected schools").

There is another important point: *these* empirical questions are ones for which respect for the judgments of the political branches is both wise and constitutionally indicated. Questions concerning which policies will help achieve the "[t]he dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement," *see* Pet. Br. at 15 (quoting *Croson*, 488 U.S. at 505-06), are ones the Constitution explicitly entrusts to *Congress* in the first instance. *See* U.S. CONST. amend. XIV § 5.

The issues before the Court are ones in which the political branches have been actively involved. *See Murray* v. *Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring in judgment) ("[J]udicial imposition of a categorical remedy . . . might pretermit other responsible solutions being considered in Congress and state legislatures."); *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 607 (1996) (Ginsburg, J., dissenting) (judicial intervention should take account of "reform measures recently adopted or currently under consideration in legislative arenas"). In the wake of *Adarand*, for example, the federal government undertook a comprehensive review of race-conscious policies in federal government contracting and other areas. *See* Resp. Br., *Adarand Constructors, Inc.* v. *Minetta*, No. 00-730 at 2-10 (describing response to Court's decision); *Adarand* v. *Constructors, Inc.* v. *Minetta*, 534 U.S. 103 (2001) (dismissing writ of certiorari as improvidently granted).

Petitioners and their *amici* argue that doing away with race-sensitive admissions policies will "hasten the day" when race ceases to play such a significant and divisive role. But it is our considered opinion that abandonment of policies like those under review in these cases will only lead to *more* social distance, greater mistrust and reliance on invalid stereotypes.

CONCLUSION

Petitioners ask this Court to impose a single, nationwide rule of higher education admissions, under which racial diversity may not be a component of the broader, educationally beneficial diversity that educators are plainly entitled to pursue. Petitioners' rule would bring an abrupt end to discussions and debates over these subjects among educators, the public, and elected representatives. It would also inhibit experimentation and innovation in policy areas where experimentation has been especially valued and where new solutions are most urgently needed.

Because we are convinced that the result reached by Justice Powell in *Bakke* was correct, because our conviction has been long and widely embraced throughout the federal government, and for the other reasons set out above, we ask that the Court reaffirm *Bakke* and affirm the judgments of the courts below.

Respectfully submitted,

Penny Shane
Theresa Trzaskoma
Philip Huynh
125 Broad Street
New York, New York 10004
(212) 558-4000

David T. Goldberg
Counsel of Record
99 Hudson Street
New York, New York 10013
(212) 334-8813

Counsel for Amici Curiae

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